Sat., 23 Aug.

Frank - Just one more thing. If you do take out the passage I suggested on p. 2 (see infra), then you will have to change the cite on p. 3 (see, infra). Hope your trip to the Far East was good. My # in Ville is (804) 977-4257. Tina

(580)

DEPARTMENT OF STATE

Washington, D.C. 20520

To FKW Hill

July 31, 1980

SECRET

TO : The Files

FROM : L/NEA - Tina A. Ravitz TR

SUBJECT : Legal Authority to Negotiate U.S. Claim Against Israel for Damage to the U.S.S. Liberty

The United States Government (USG) has had a claim outstanding against the Government of Israel (GOI) for damage by the Israelis to the U.S.S. Liberty during the 1967 war ever since July 1, 1968. Although the GOI immediately assumed responsibility for firing on the ship and took the initiative to offer to make amends for loss of life and material damage, when the USG presented its claim for $7,644,146, the GOI denied responsibility but offered to pay a nominal sum. The USG rejected this nominal offer but did not press the GOI to settle until 1978. In an exchange of diplomatic notes in February and May of 1978, the USG and GOI agreed to negotiate a settlement of this claim. A change in the Israeli ambassador to the U.S. and the Camp David peace negotiations both delayed the start of negotiations. The Israeli desk officers anticipate that the talks will begin this fall.

The Department of State, on behalf of the President, has authority to negotiate the claim. This power stems from the constitutional authority of the President to settle claims of or against the U.S. As Justice Frankfurter wrote, "That the President's control of foreign relations includes the settlement of claims is indisputable." United States v. Pink, 315 U.S. 203, 240 (Frankfurter, J., concurring) (1942). See also Ozanic v. United States, 188 F.2d 228 (2d Cir. 1951) and Louis Henkin, Foreign Affairs and the Constitution, p. 89 (1972).

Some people would argue, however, that to negotiate a claim for a nominal sum with the GOI would amount to the disposition of property of the United States (i.e., the claim,

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not the ship), an activity properly within the scope of Congress. See U.S. Constitution, Article IV, §3, cl.2:

> The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

The basis of this argument lies in the principles of the law of property; a public claim belonging to the USG is U.S. property, as a claim is a chose in action. Two factors diminish the credibility of this argument.

I. Negotiation of this claim with Israel, which would not require an appropriation of funds, probably does not amount to a "disposition of property" within the meaning of Article IV, §3, cl.2 for two reasons. First, the constitutional history of this provision indicates that its main focus is on territorial property and not on whether the President settles a claim for less than 100 cents on the dollar. As the United States Court of Appeals for the District of Columbia Circuit noted in Edwards v. Carter, 580 F.2d 1055, cert. denied 436 U.S. 907 (1976):

> [T]he debates of the Constitutional Convention clearly demonstrate that the property clause was intended to delineate the role to be played by the central government in the disposition of Western lands which were potential new states. . . . This history demonstrates the limited concerns giving rise to the inclusion of Article IV, §3, cl.2 in the Constitution.

Id. at 1059. Thus, the property clause is not meant to apply to settlement or negotiations of the USG's claim against the GOI.

Second, although a claim for damages is property, the claim against the GOI is for an unliquidated amount. Hence, the value of the claim is subject to contention by both negotiating parties. The President may arguably settle for less than the amount the USG claimed originally and still not "dispose of U.S. property," particularly when, as in this case where the ship was not restored, the value of the claim is not definitive. The President, then, has much

leeway in negotiating a settlement of an unliquidated claim with the GOI before it amounts to "dispostion of property."

II. Even if negotiation of the claim with the GOI did amount to a "disposition of property," Congress does not have exclusive authority in that area. The President may enter into treaties to dispose of U.S. property. See Edwards v. Carter, supra. Although Edwards dealt with the disposition of tangible property by treaty (the Panama Canal Treaty), an executive agreement to settle a claim would not run afoul of Article IV, §3, cl.2 either. In fact, the Department of State has relied on the President's foreign relations authority to conclude numerous agreements settling claims of both U.S. nationals and the USG against foreign governments.

580 F.2d 1055, cert. denied, 436 U.S. 907 (1976).

When France pulled out of NATO, the USG had a claim against the French government for relocation of military forces, supplies, and equipment. This claim was settled for a nominal sum and effected by an exchange of notes between the U.S. ambassador to France and the French minister of foreign affairs. See T.I.A.S. 8146, 28 U.S.T. 1909 -- entered into force June 12, 1975. The USG settled for a nominal sum a claim it had against the Hungarian government for an aerial incident in 1951. The settlement, by executive agreement, also included claims by U.S. nationals. See T.I.A.S. 7569, 24 U.S.T. 522 -- entered into force March 6, 1973. The USG settled a similar claim with the Yugoslavian government. See T.I.A.S. 1803, 12 Bevans 1277 -- entered into force July 19, 1948.

Given the above examples and others, negotiation of the USG's claim against the GOI -- even for a nominal sum -- is within the scope of executive authority. This practice of settling claims of the USG for a nominal amount by executive agreement gives rise to a weighty presumption that such activity is within the executive power of the President. See United States v. Midwest Oil Co., 236 U.S. 459, 472-73 (1914).

For the foregoing reasons, the Department of State has the legal authority to negotiate the USG's claim against the GOI for damage to the U.S.S. Liberty.

cc: L - Mr. Feldman
L/NEA - Mr. Willis
Mr. Ramish

L/NEA:TARavitz:mf
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